Filed 4/27/16 Biller v. Faber CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DIMITRIOS P. BILLER, Plaintiff and Appellant, v. MICHAEL FABER, Defendant and Respondent.	B244232 (Los Angeles County Super. Ct. No. SC103362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cesar Sarmiento, Judge. Affirmed.

Dimitrios P. Biller, in pro. per., for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford, Stockalper & Moore, Cindy A. Shapiro, James J. Kjar, and Evan N. Okamura; Nemecek & Cole, Jonathan B. Cole and Cindy A. Shapiro for Defendant and Respondent.

Littler Mendelson, Alan B. Carlson and Fermin H. Llaguno for Toyota Motor Sales, U.S.A., Inc. as Amicus Curiae on behalf of Defendant and Respondent.

This is an appeal from a judgment dismissing a complaint for legal malpractice and breach of fiduciary duty. We shall affirm based on the confidentiality of communications made in the course of mediation. (Evid. Code, § 1119;[1] *Cassel v. Superior Court* (2011) 51 Cal.4th 113 (*Cassel*).)

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and appellant Dimitrios P. Biller was employed as in-house counsel for Toyota Motor Sales, U.S.A., Inc. During his employment, Biller came to believe he had been hired by Toyota to commit litigation fraud. He felt compelled to resign, and in June 2007 retained an attorney—defendant and respondent Michael Faber—to represent him in his employment dispute with Toyota.

The employment dispute was submitted to a mediator. At the conclusion of the mediation hearing on August 9, 2007, the mediator provided "a 'Mediator's Proposal' containing settlement terms that included, among other things, a confidentiality provision and liquidated damages clause."[2] Faber advised Biller to accept the mediator's proposal, and offered to reduce his contingency fee from 40 percent to 25 percent. Biller accepted the mediator's proposal the following day.[3] The proposal was reduced to a written severance agreement that Biller signed on September 6, 2007. Under the terms of that agreement, Biller recovered almost $4 million from Toyota, of which $950,000 was paid to Faber as attorney fees.

After resigning from Toyota, Biller established a legal consulting business and created a website on which information about Toyota was posted. Upon learning of these and other disclosures, Toyota sued Biller in 2008 for alleged breaches of the

---

[1] Unless otherwise indicated, all further statutory references are to the Evidence Code.

[2] The quoted language is taken from Biller's second amended complaint in the present action.

[3] According to the opening brief, Biller "agreed on a monetary figure to settle the case on August 10, 2007."

confidentiality provision of the severance agreement.[4] (*Toyota Motor Sales, U.S.A., Inc. v. Dimitrios P. Biller* (Super. Ct. L.A. County, No. SC100501 (state court action).) In 2009, Biller sued Toyota in federal court for alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.) (this claim was later dismissed), constructive wrongful discharge, intentional infliction of emotional distress, and defamation. (*Biller v. Toyota Motor Corporation* (9th Cir. 2012) 668 F.3d 655 (federal court action).)

The state and federal court actions were submitted to joint arbitration under terms of the severance agreement. The arbitrator awarded Toyota $2.5 million in liquidated damages ($25,000 per violation of the confidentiality provision) and $100,000 in punitive damages, and proposed a permanent injunction prohibiting Biller from disclosing Toyota's confidential and privileged information.

Toyota sought to confirm the arbitrator's award in both state and federal court actions. In each action, Toyota obtained a judgment confirming the arbitrator's award and a permanent injunction prohibiting disclosure of its confidential and privileged information. Both judgments were affirmed on appeal. (*Biller v. Toyota Motor Corporation*, *supra*, 668 F.3d 655; *Toyota Motor Sales, U.S.A., Inc. v. Biller* (Mar. 23, 2012, B234763) [nonpub. opn.].)

In the present action, Biller is suing Faber for alleged malpractice in the employment dispute and for breach of fiduciary duty. (*Dimitrios P. Biller v. Michael Faber* (Super. Ct. L.A. County, No. SC103362).) According to the allegations of the second amended complaint, the operative pleading, Faber made numerous misrepresentations to Biller, including that Faber specialized in employment litigation and would "negotiate hard" to obtain the "best terms in the severance agreement"; the provision in the severance agreement requiring disputes to be arbitrated by JAMS was

---

[4] The confidentiality provision precluded Biller from disclosing or using any confidential information, privileged communications, attorney-client communications, attorney work product, litigation and case handling or strategies, vendor data, contracts, or any other confidential or proprietary information relating to Toyota.

"non-negotiable"; and the severance agreement was a "take it or leave it offer" that Biller would have to sign without changes because he "would not get a better severance agreement." In addition, Faber neglected to show Biller the working drafts of the severance agreement, explain the significance of adopting the "JAMS Rules" of arbitration, advise him to seek expert advice regarding the tax consequences of the severance payment, submit disability claims on his behalf, and seek a disability leave from Toyota (which he claims would have eliminated taxes on the severance payment). The prayer for damages included the attorney fees paid to Faber in the employment dispute ($950,000), taxes paid on the severance payment ($950,000),[5] and Biller's share of the arbitration fees in the state and federal court actions.

After Faber requested documents in Biller's possession pertaining to the employment dispute, Toyota, a non-party,[6] filed an ex parte application to stay production of documents containing its confidential information. Biller opposed the request for a stay, and filed a declaration that contained Toyota's confidential information. Toyota moved to seal the declaration, arguing it contained confidential information protected by federal and state court injunctions, attorney-client privilege, and Business and Professions Code section 6068, subdivision (e). Biller argued that by hiring him for the unlawful purpose of committing litigation fraud, Toyota had forfeited the

---

[5] Coincidentally, Biller paid equal amounts in taxes ($950,000.00) and attorney fees ($950,000.00). The complaint alleged in relevant part: "Defendant did not suggest that Plaintiff consult a tax expert or tax attorney regarding funds paid by [Toyota] to Plaintiff, and/or Defendant's direct payment of his attorney's fees by [Toyota], for tax reasons that were for the benefit of Defendant, to Plaintiff's detriment[.]" "Plaintiff sustained damages and was harmed by Defendant's legal malpractice. Among other things, Defendant took an unreasonable and excessive fee in the amount of $950,000.00 for the substandard legal services he provided Plaintiff. Moreover, the terms of the Severance Agreement required and resulted in Plaintiff's payment of $950,000.00 in taxes, which Plaintiff would not have had to pay had he been appropriately represented by Defendant."

[6] Toyota has not sought to intervene in the action.

attorney-client privilege under the crime-fraud exception (§ 956).[7] He filed redacted copies of the documents and moved to produce them under seal. Based on federal and state court injunctions prohibiting disclosure of Toyota's confidential information, the trial court sealed Biller's declaration, stayed the production of documents, and sealed the confidential documents filed by Biller.

In light of these developments, Faber moved for dismissal of the complaint. In his motion for dismissal, he argued that due to Toyota's assertion of its privilege and confidentiality of mediation, he was incapable of obtaining or using the evidence he would need to defend himself at trial (citing *Cassel, supra,* 51 Cal.4th at p. 130; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786 (*Dietz*); *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 568 (*Solin*)).

Over Faber's objection, the trial court appointed a referee (Retired Judge David Horowitz) to manage and oversee discovery, rule on pending discovery motions, determine what evidence would be available to Faber at trial—taking into account the mediation confidentiality statutes, federal and state injunctions, and attorney-client privilege—and make a recommendation on Faber's motion to dismiss. Biller's petition for writ of mandate to overturn the appointment was denied. (No. B235941.)

Without ruling on pending discovery motions, the referee found that neither party could proceed with the action due to inadmissibility of necessary evidence. In the referee's view, all of the privileged or confidential information and documents that Biller obtained while serving as in-house counsel were inadmissible in the prosecution of his action against Faber. Similarly, all of the privileged or confidential information and documents that Faber obtained while representing Biller in the employment dispute were inadmissible in his defense of the present action. The referee recommended dismissal based on the attorney-client privilege (citing *Dietz, supra,* 171 Cal.App.4th 771; *Solin,*

---

[7] Section 956 provides: "There is no [attorney-client] privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

supra, 89 Cal.App.4th 451) and mediation confidentiality statutes (citing *Cassel*, *supra*, 51 Cal.4th 113).

The trial court adopted the referee's recommendation and dismissed the action based on the attorney-client privilege. It reasoned that in order to prove his malpractice claim, Biller must show he would have obtained a more favorable severance agreement in the underlying employment dispute (the "case within a case") in the absence of Faber's alleged breaches of the duty of care;[8] however, Biller is unable to prove his "case within a case" due to inadmissibility of Toyota's confidential and privileged information. Similarly, Faber is unable to prove his defense. Accordingly, the court granted dismissal "on the ground that the attorney-client privilege bars Defendant from adequately representing himself in this case." A final judgment of dismissal was entered, and this appeal followed.

DISCUSSION

Biller contends the de novo standard of review is the appropriate standard for this appeal. We agree. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 145–146;[9] *Coshow v. City*

---

[8] "The elements of a legal malpractice cause of action are '(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. [Citations.]' (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194.) In a legal malpractice claim, the method for proving the element of causation has been likened to a 'trial within a trial' or a 'case within a case.' (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240, fn. 4 (*Viner*); see also *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 834 [comparing standards of proof in accounting malpractice with those in legal malpractice].) 'The case-within-a-case or trial-within-a-trial approach applied in legal malpractice cases [is] an objective approach to decide *what should have been the result* in the underlying proceeding or matter. [Citation.]' (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1585.)" (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531.)

[9] "In ruling on a common law motion for judgment on the pleadings made by a defendant, a trial court determines what has been called a pure question of law [citations], but what is in fact a mixed question of law and fact that is predominantly legal: does the plaintiff's complaint state facts sufficient to constitute a cause of action against the

of Escondido (2005) 132 Cal.App.4th 687, 702–703.)[10]

Before turning to the issue of mediation confidentiality, which is dispositive, we briefly explain why Biller's assignments of error do not lead to a finding of reversible error.[11] Even if we were to assume that on this record, dismissal is not necessary to

---

defendant? [Citations.] In so doing, the trial court generally confines itself to the complaint and accepts as true all material facts alleged therein. [Citation.] As appropriate, however, it may extend its consideration to matters that are subject to judicial notice. [Citation.] In this, it performs essentially the same task that it would undertake in ruling on a general demurrer. That is not surprising. A common law motion for judgment on the pleadings 'ha[s] the purpose and effect of a general demurrer.' [Citations.] . . . [¶] An appellate court independently reviews a trial court's order on such a motion. [Citations.] That is certainly proper. Independent review is called for when the underlying determination involves a purely legal question or a predominantly legal mixed question. [Citations.] As stated, the determination here is such." (*Smiley v. Citibank, supra*, 11 Cal.4th at pp. 145–146.)

[10] "Judgment on the pleadings is similar to a demurrer and is properly granted when the 'complaint does not state facts sufficient to constitute a cause of action against [the] defendant.' (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii) . . . .) The grounds for the motion must appear on the face of the challenged pleading or from matters that may be judicially noticed. (Code Civ. Proc., § 438, subd. (d).) The trial court accepts as true all material facts properly pleaded but does not consider conclusions of law or fact, opinions, speculation, or allegations contrary to law or facts which are judicially noticed. [Citation.] . . . [¶] We independently review the trial court's ruling on a motion for judgment on the pleadings to determine whether the complaint states a cause of action. In so doing, we accept as true the plaintiff's factual allegations and construe them liberally. [Citation.] If a judgment on the pleadings is correct upon any theory of law applicable to the case, we will affirm it regardless of the considerations used by the trial court to reach its conclusion. [Citation.]" (*Coshow v. City of Escondido, supra*, 132 Cal.App.4th at pp. 702–703.)

[11] Biller seeks a reversal with directions to resolve preliminary issues such as the crime-fraud exception, discovery motions, and feasibility of alternative measures to maintain confidentiality—limiting orders, sealing orders, or in camera hearings—while allowing the case to proceed. He contends that dismissal is a drastic measure that should be only used if no other means exist to protect Toyota's confidentiality. (*Dietz, supra*, 177 Cal.App.4th at pp. 793–794.)

Were we to set aside the issue of mediation confidentiality, Biller's arguments would have merit for several reasons. First, the attorney-client privilege does not apply in an action between an attorney and a client for a breach arising from the attorney-client

preserve Toyota's confidentiality as a matter of law, Biller is not entitled to a reversal in the absence of prejudicial error. In order to establish prejudicial error,[12] he must show the judgment is incorrect under any applicable theory of law, including the mediation confidentiality statutes and *Cassel*, *supra*, 51 Cal.4th 113. (See *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999 [judgment may be affirmed on any basis presented by the record whether or not relied upon by trial court]; *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216–1217 [because appellate court reviews trial court's decision rather than its reasoning, its ruling will be affirmed if correct, even if given for wrong reason].)

We conclude this alternative theory of dismissal—which was raised by Faber in the motion to dismiss, adopted by the referee in his recommendation to grant the motion, and addressed by both parties in their respective briefs on appeal—is properly before us.

I

Mediation is intended to provide "a simplified and economical procedure for obtaining prompt and equitable resolution" of disputes. (Code Civ. Proc., § 1775,

---

relationship. (*Anten v. Superior Court* (2015) 233 Cal.App.4th 1254, 1256.) Second, to the extent Toyota is seeking to preserve its secrets from Faber, it is too late to close that door. And third, Toyota's secrets are safe with Faber, who is bound by the same rules of confidentiality and privilege as Biller. (See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 311 [plaintiff, former in-house counsel for defendant corporation, entitled to make limited disclosure of former employer's secrets to her own attorneys to the extent necessary to prepare her wrongful discharge claim; such disclosures are not *public* disclosures and the attorney for the in-house counsel is bound by the same "rules of confidentiality and attorney-client privilege"].)

[12] "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., § 475.)

subd. (c).) Because mediation may help "reduce the backlog of cases burdening the judicial system," the Legislature has declared it is "in the public interest for mediation to be encouraged and used where appropriate by the courts." (*Ibid.*)

"[C]onfidentiality is essential to effective mediation." (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14 (*Foxgate*).) Confidentiality "promote[s] 'a candid and informal exchange regarding events in the past," which "is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.' [Citations.]" (*Ibid.*) "To carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme . . . unqualifiedly bars disclosure of" all communications, writings, and settlement discussions associated with a mediation "absent an express statutory exception." (*Id.* at p. 15.)

The mediation confidentiality statutes apply to all communications, negotiations, or settlement discussions for the purpose of, in the course of, or pursuant to a "mediation"[13] or a "mediation consultation."[14] The principal confidentiality provision at issue in this case is section 1119. Subdivision (a) of that section provides: "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." Subdivision (c) states: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

---

[13] The term "mediation" is defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (§ 1115, subd. (a).)

[14] The term "mediation consultation" means "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." (§ 1115, subd. (c).)

The purpose of section 1119 is to encourage "the resolution of disputes by means short of litigation." (*Cassel, supra*, 51 Cal.4th at p. 132.) Section 1119 applies in equal force during and after a mediation, and "prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation." (*Foxgate, supra*, 26 Cal.4th at p. 13; *Amis v. Greenberg Traurig LLP* (2015) 235 Cal.App.4th 331, 338 ["Even after mediation ends, communications and writings protected by the statutes are to remain confidential. (§ 1126.)"].)

An unavoidable consequence of the confidentiality provisions is the increased difficulty of proving attorney malpractice in the mediation context. In *Cassel*, the leading case on this subject, the plaintiff sued his former attorneys for alleged malpractice in a prior mediation. (51 Cal.4th at p. 118.) The defendants moved to exclude evidence of all confidential communications made during mediation. (§ 1119.) That motion was granted. The plaintiff petitioned for a writ of mandate, which the appellate court granted. The Supreme Court reversed, holding that the plain terms of the mediation confidentiality statutes must govern, "even though they may compromise petitioner's ability to prove his claim of legal malpractice. [Citations.]" (*Cassel*, 51 Cal.4th at pp. 118–119.)

Cassel explained that the confidentiality provisions were designed "to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement." (*Cassel, supra*, 51 Cal.4th at pp. 132–133.)

A confidential communication made during mediation will remain private unless *all* participants in the communication agree to its disclosure. (*Cassel, supra*, 51 Cal.4th at p. 133.) In light of Toyota's refusal to waive confidentiality of its mediation-related communications, that evidence will be inadmissible at trial, even though the parties are unable to proceed without it. "[T]here is no 'attorney malpractice' exception to mediation confidentiality . . . ." (*Ibid.*) '"[I]f an exception is to be made for legal

misconduct, it is for the Legislature to do, and not the courts. [Citation.]"' (*Ibid.*, quoting *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 163.)

According to *Cassel*, an exception to mediation confidentiality exists where the "result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose." (*Cassel*, *supra*, 51 Cal.4th at p. 119.) As in *Cassel*, we find nothing that precludes the plain terms of the mediation confidentiality statutes from governing the admissibility issue in this case.

The appellate court reached the same conclusion in *Amis*, *supra*, 235 Cal.App.4th 331. In that case, the plaintiff sued his former attorneys for alleged malpractice in an underlying mediation. The defendants successfully moved for summary judgment based on the inadmissibility of confidential communications made during mediation. In affirming the judgment, the appellate court noted the outcome was "dictated" by *Cassel*. (235 Cal.App.4th at p. 339.) Even though mediation confidentiality "may hinder a client's ability to prove a legal malpractice claim against his or her lawyers," the judiciary has "no authority to craft its own exceptions to the mediation confidentiality statutes, 'even where the equities appear[] to favor them.' [Citation.]" (*Ibid.*)

Biller argues that because Faber's alleged malpractice occurred *after* the mediation ended, his case is not based on any confidential communications made *during* mediation, and hence the confidentiality provisions do not apply. This claim conflates the confidentiality of mediation-related communications with the mediation itself. According to section 1126, "[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends."

Regardless of Biller's ability to prove his case without violating Toyota's confidentiality, Faber has a right to put on a defense. Because Faber is precluded from presenting a defense due to inadmissibility of confidential communications under section 1119, that is a valid basis for dismissal.

In order for Faber to explain his mediation strategy, he would have to present evidence of confidential communications received during mediation regarding Toyota's views on sensitive topics—such as its evaluation of Biller's performance as in-house counsel, his future earning potential, and his right to a disability leave. But Faber is precluded by section 1128 from relying on Toyota's confidential communications at trial, and doing so in violation of the confidentiality statutes would provide a basis for new trial. (§ 1128[15] [evidence admitted in violation of § 1119 is basis for new trial]; *Amis*, *supra*, 235 Cal.App.4th at p. 343 [same].)

Biller's reliance on the 10-day provision of subdivision (a)(5) of section 1125 is misplaced.[16] The statute lists several factors that may be used to determine when a mediation ends. One factor is the passage of "10 calendar days [during which] there is no

---

[15] "Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief." (§ 1128.)

[16] Subdivision (a) of section 1125 states: "For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

"(1) The parties execute a written settlement agreement that fully resolves the dispute.

"(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

"(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

"(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

"(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement."

communication between the mediator and any of the parties to the mediation relating to the dispute." (§ 1125, subd. (a)(5).) Biller argues that because the severance agreement was signed following a 10-day period during which there was no communication from the mediator, the employment dispute was *not* settled during mediation, and therefore the mediation confidentiality provisions do not apply in this case. There is no support for this argument, which would lead to an absurd result given that the parties accepted the mediator's proposal and executed a written settlement agreement. Where the dispute is fully resolved by a written settlement agreement, the mediation ends—but not mediation confidentiality—with the signing of that agreement, notwithstanding a 10-day period during which there was no communication from the mediator. (See §§ 1125, subd. (a)(1) [mediation ends with signing of settlement agreement], 1126 [confidentiality continues even after mediation ends]; *Amis, supra,* 235 Cal.App.4th at p. 338.)

II

Finally, we turn to Biller's remaining issues. The first is that the trial court erred in failing to consider his claim for breach of fiduciary duty. We find no prejudicial error. The complaint's factual allegations for both causes of action are essentially the same. We therefore conclude for reasons previously discussed that dismissal under section 1119 and *Cassel* is appropriate as to the entire complaint.

The second is that the referee was asked to decide issues of law in violation of Code of Civil Procedure section 639, subdivision (a)(3).[17] We disagree. The record reflects the referee was appointed to oversee and manage discovery, which involves questions of fact. (*Bird v. Superior Court* (1980) 112 Cal.App.3d 595, 600 ["Questions of fact which qualify as 'other than upon the pleadings' may arise upon discovery motions"].) Moreover, even if we were to strike the referee's findings, we would reach the same result. Under the de novo standard of review, we are affirming on a ground

---

[17] "When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in the following cases . . . [¶] (3) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action." (Code Civ. Proc., § 639, subd. (a)(3).)

that, although raised below, was not relied upon by the trial court. Accordingly, any error in appointing the referee was harmless.

DISPOSITION

The judgment is affirmed. Faber is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.